FILED
United States Court of Appeals
Tenth Circuit

September 21, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TOJIDDIN BERDIEV,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

Nos. 20-9542 & 20-9602

Petition for Review from an Order of the Board of Immigration Appeals

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Andrew Bramante (Hans Meyer with him on the briefs), Meyer Law Office P.C., Denver, Colorado, for Petitioner.

Jessica R. Lesnau, Trial Attorney, Office of Immigration Litigation (Brian Boynton, Acting Assistant Attorney General, Civil Division; Anna E. Juarez, Senior Litigation Counsel, Office of Immigration Litigation; Jeffrey R. Meyer, Attorney, Office of Immigration Litigation, on the brief), United States Department of Justice, Washington, D.C., for Respondent.

Before **BACHARACH**, **EBEL**, and **PHILLIPS**, Circuit Judges.

EBEL, Circuit Judge.

Petitioner Tojiddin Berdiev has faced immigration removal proceedings since 2007. After more than a decade of petitions, motions, and appeals, the Board of

Immigration Appeals denied Berdiev's untimely motion to reopen removal proceedings (Berdiev's second such motion), then denied Berdiev's motion to reconsider. Berdiev now petitions this Court for review of both decisions.

In each of its two orders, the Board held that (1) Berdiev was not entitled to equitable tolling of his untimely motion to reopen, and (2) exercise of the Board's sua sponte reopening authority was unwarranted. Berdiev argues that the Board abused its discretion in making the first determination and relied on an erroneous legal premise in making the second. On equitable tolling, we conclude that the Board did not abuse its discretion. On the exercise of the Board's sua sponte reopening authority, however, we conclude that the Board at least partly relied on a legally erroneous—and thus invalid—rationale, and we cannot determine whether the Board would have reached the same outcome independently based solely on valid reasons.

Accordingly, exercising jurisdiction under 8 U.S.C. § 1252(a), the Court grants Berdiev's petitions for review, vacates the Board's two orders solely as to the sua-sponte reopening decision, and remands to the Board to reconsider that decision in light of our opinion.

I. BACKGROUND

Berdiev, a Tajikistan citizen, first came to the United States in 2007 as a nonimmigrant student. Within months, however, Berdiev failed to maintain his student status and the Department of Homeland Security commenced removal proceedings against him. Berdiev attempted to avoid removal by claiming marriage to a U.S. citizen. The Immigration Judge ("IJ") continued the matter seven times to

allow Berdiev to pursue the I-130 petition process, which would enable Berdiev to apply for permanent residence or adjustment of immigration status based on the marriage.

Eventually, however, Citizenship and Immigrations Services ("CIS") denied the I-130 petition (and a refiled petition) from Berdiev's wife attempting to establish his status as a spouse of a U.S. citizen, finding that she had failed to show that they had entered the marriage in good faith. Deeming any additional I-130 petitions futile, the IJ refused any further continuances and instead granted Berdiev's request for voluntary departure, giving Berdiev sixty days to leave the country voluntarily. At this point, five years had passed since Berdiev first became removable.

Berdiev, represented by the Bull & Davies law firm, appealed to the BIA. That appeal remained pending for twenty-seven months, during which time Berdiev's voluntary departure period was stayed. Ultimately, the BIA dismissed Berdiev's appeal and reinstated Berdiev's sixty-day voluntary departure period. The BIA mailed a copy of its decision to Berdiev's home address and a copy to Bull & Davies. Bull & Davies then mailed an additional copy to Berdiev's home address.

Unfortunately, Berdiev had moved residences during the twenty-seven months the appeal was pending. Both copies of the BIA decision sent to Berdiev's prior home address were returned as undeliverable. According to Berdiev, he did not receive notice of the BIA decision—and the sixty-day voluntary departure period—until six months later, when he contacted Bull & Davies for a status update. At this

point, the voluntary departure period was long expired. Berdiev did not voluntarily depart.

Instead, Berdiev hired a new attorney, Youras Ziankovich, to file a motion to reopen his removal proceedings on the basis of ineffective assistance of counsel, claiming that Bull & Davies had erred by, among other things, failing to notify Berdiev of the voluntary departure period. Around this same time, Berdiev divorced his wife and remarried, again to a U.S. citizen. Berdiev again sought to adjust his immigration status based on his marriage, filing a new I-130 petition.

Three months later, the BIA denied Berdiev's motion to reopen, deeming it untimely. The BIA declined to address Berdiev's ineffective-assistance-of-counsel claim, finding that Berdiev had failed to comply with the BIA's procedural requirements for bringing such a claim. The BIA also declined to exercise its sua sponte authority to reopen removal proceedings, determining there had been no showing of exceptional circumstances. The Board mailed a copy of its decision to Berdiev.

Another three months after that, CIS approved Berdiev's pending I-130 petition, which would have made him eligible to adjust his immigration status were it not for the removal order. Berdiev took no action at this time.

Three years later, Berdiev, still residing in the United States, filed a second motion to reopen the removal proceeding. Now represented by present counsel, Berdiev again argued ineffective assistance of prior counsel, this time asserting deficient performance by Attorney Ziankovich (who filed Berdiev's first motion to

reopen). Berdiev claimed that he had contacted Ziankovich for an update every two months for three years, but Ziankovich never told him of the BIA's denial of his motion. Berdiev requested relief from both his prior attorneys' ineffective assistance, asking the BIA to apply equitable tolling to his untimely motions to reopen, and to reopen his case so he could pursue lawful status based on the granted I-130 petition. In the alternative, Berdiev asked the Board to exercise its sua sponte authority to reopen despite the untimeliness of his motion.

The BIA denied Berdiev's motion, ruling that Berdiev failed to demonstrate the due diligence required for equitable tolling because he failed to explain why he persisted in attempting to contact Ziankovich for three years before hiring a new attorney. The Board also noted that Berdiev was precluded from the relief he ultimately sought because he was statutorily barred from adjustment of status in light of his failure to depart voluntarily during the voluntary departure period. The Board thus denied Berdiev's motion to reopen and declined to reopen sua sponte. Berdiev petitioned this Court for review of the BIA's decision. (Appeal No. 20-9542.)

While Berdiev's petition for review was pending before this Court, he filed a motion to reconsider with the Board, arguing that he had demonstrated due diligence sufficient for equitable tolling and that he was not statutorily barred for failing to depart voluntarily. The BIA denied that motion as well, and Berdiev petitioned this Court for review of that decision too. (Appeal No. 20-9602.) This Court consolidated both petitions.

II. JURISDICTION

Our jurisdiction extends to a BIA decision denying a motion to reopen as untimely and rejecting a request for equitable tolling. Mata v. Lynch, 576 U.S. 143, 147–48 (2015). In contrast, this Court generally lacks jurisdiction to review a BIA decision as to whether to reopen sua sponte, "because there are no standards by which to judge the agency's exercise of discretion." Jimenez v. Sessions, 893 F.3d 704, 708–09 (10th Cir. 2018) (quotation omitted). We may, however, remand where the BIA bases its discretionary decision on an incorrect legal premise. Reyes-Vargas v. Barr, 958 F.3d 1295, 1300 (10th Cir. 2020). Here, Berdiev argues that the BIA declined to reopen sua sponte because it erroneously deemed Berdiev ineligible for adjustment of status based on his failure to depart voluntarily. Berdiev's statutory eligibility presents a question of law subject to this Court's jurisdiction. See id.

III. STANDARD OF REVIEW

We review BIA decisions on motions to reopen and motions to reconsider for an abuse of discretion. Infanzon v. Ashcroft, 386 F.3d 1359, 1362 (10th Cir. 2004); Rodas-Orellana v. Holder, 780 F.3d 982, 990 (10th Cir. 2015). "The BIA abuses its discretion when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." Qiu v. Sessions, 870 F.3d 1200, 1202 (10th Cir. 2017) (quotation omitted). "[C]ommitting a legal error or making a factual finding that is not supported by substantial record evidence is necessarily an abuse of discretion." Id. (quotation omitted). Motions to reopen are "plainly disfavored," and Berdiev

bears a "heavy burden" to show the BIA abused its discretion. Maatougui v. Holder, 738 F.3d 1230, 1239 (10th Cir. 2013) (quotation omitted).

IV. DISCUSSION

The BIA denied Berdiev's second motion to reopen and motion to reconsider on the same two grounds: (1) Berdiev's motion to reopen was untimely and he was not entitled to equitable tolling because he failed to demonstrate due diligence, and (2) Berdiev was statutorily barred from adjustment of status due to his failure to depart within the voluntary departure period. Berdiev challenges each ground. We agree that Berdiev's motion to reopen based on equitable tolling is untimely and not entitled to equitable tolling. However, as to the adjustment of status issue, we conclude the BIA erred. Because that issue served as a basis for the Board's decision not to reopen sua sponte, and because it is unclear from the Board's orders whether it independently relied on any other, valid reason for declining to exercise that authority, we grant Berdiev's petitions and remand for the BIA to reconsider whether to reopen sua sponte.

A. Whether the BIA abused its discretion when it determined that Berdiev failed to demonstrate the due diligence required for equitable tolling.

Berdiev does not dispute that his second motion to reopen was both untimely and number-barred. See 8 U.S.C. § 1229a(c)(7)(A); 8 C.F.R. § 1003.2(c)(2) (permitting one motion to reopen, filed no later than ninety days after the final administrative decision). Instead, Berdiev tried to avoid those issues below by

arguing for equitable tolling based on ineffective assistance of counsel. See Mahamat v. Gonzalez, 430 F.3d 1281, 1283 (10th Cir. 2005).

The BIA rejected Berdiev's equitable-tolling argument, however, concluding that Berdiev had failed to demonstrate that he had exercised due diligence in pursuing his case. Berdiev challenges that conclusion on three grounds, arguing that the BIA erred by (1) failing to articulate a reviewable standard of due diligence, (2) failing to consider Berdiev's individual circumstances and particular vulnerabilities, and (3) finding that Berdiev failed to demonstrate due diligence. We address each argument in turn, concluding that each lacks merit.

(1) Whether the BIA failed to articulate a reviewable standard.

Berdiev first argues that the BIA failed to articulate a reviewable standard of due diligence and that "[f]ailure to state the correct legal standard is reversible error," citing Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1070 (2020). (Pet'r Br. 26.) Berdiev faults the BIA for not defining "due diligence," and not "indicat[ing] whether its standard was objective reasonableness." (Id.)

But Berdiev does not argue that the BIA articulated the wrong standard, just that it failed to elaborate on what "due diligence" means. This is not an abuse of discretion, and Guerrero-Lasprilla does not suggest otherwise. Nothing in that case purports to impose an obligation on the BIA to elaborate on the legal standards it applies. Instead, Guerrero-Lasprilla at most implies that a BIA decision would be subject to judicial review if it articulated an incorrect legal standard. See 140 S. Ct. at 1070, 1073 (noting that declining to exercise judicial review over mixed questions

of law and fact "would effectively foreclose judicial review of the Board's determinations so long as it announced the correct legal standard").

This is not a novel proposition: it is well-established that "committing a legal error . . . is necessarily an abuse of discretion." Elzour v. Ashcroft, 378 F.3d 1143, 1150 n.9 (10th Cir. 2004). The BIA does not, however, abuse its discretion when "its statements are a correct interpretation of the law, even when the BIA's decision is succinct." Maatougui, 738 F.3d at 1239 (quotation omitted). Berdiev cites no authority requiring the BIA to expound upon established legal principles.

Here, the BIA's order articulated the relevant legal principle for equitable tolling: "The respondent bears the burden of persuasion to show that equitable tolling is warranted, including demonstrating due diligence in seeking reopening. See Galvez Pineda v. Gonzales, 427 F.3d 833, 838–39 (10th Cir. 2005)." (A.R. 30.) This is a correct statement of the law, additionally supported by the citation to a case that further states that equitable tolling based on ineffective assistance of counsel would be appropriate up to the point at which the alien "knew or should have known of prior counsel's ineffectiveness." Galvez Pineda, 427 F.3d at 838. The BIA did not err in relying upon this Court's precedent to state the applicable legal standard.

(2) Whether the BIA applied the wrong due diligence standard.

Berdiev next argues that the BIA erred by applying a due diligence standard that failed to incorporate an objective-reasonableness standard and failed to consider Berdiev's unique circumstances. Specifically, Berdiev argues that "[t]he Board's single use of the term 'due diligence' does not incorporate the reasonableness

standard required by Holland[v. Florida, 560 U.S. 631 (2010),] and Guerrero-Lasprilla, because the Board's decision shows that it did not consider Mr. Berdiev's unique circumstances."[1] (Pet'r Br. 26.) Berdiev asks the Court to "direct the Board to adopt and apply a standard for due diligence that considers whether the movant's efforts were reasonable in light of his individual circumstances, including his vulnerability and dependence on his attorneys." (Id. at 28–29.)

Even assuming Berdiev's standard is the appropriate one, there is no indication that the BIA failed to consider the objective reasonableness of Berdiev's actions in light of his circumstances. The BIA cited Galvez Pineda, where this Court deemed equitable tolling based on ineffective assistance of counsel to be appropriate up to the point at which the non-citizen "knew or should have known of prior counsel's ineffectiveness." 427 F.3d at 838. That is a standard based on objective reasonableness in light of the circumstances. See Olivas-Melendez v. Wilkinson, 845 F. App'x 721, 728 (10th Cir. 2021) (unpublished) ("[T]he test is . . . when such circumstances should have been discovered by a reasonable person in the situation." (quotation marks and alteration omitted)). And the BIA expressly referred to Berdiev's particular circumstances in its order, so there is no indication that the BIA failed to apply the standard for which Berdiev advocates.

[1] Holland is a habeas case, so the BIA did not abuse its discretion by not relying upon it. Guerrero-Lasprilla is an immigration case, but Berdiev cites the dissent (without acknowledging that it is a dissent) for its articulation of the due diligence standard. (Pet'r Br. 29 (citing 140 S. Ct. at 1074 (Thomas, J., dissenting)).) The BIA did not abuse its discretion by not relying upon a Supreme Court dissent.

At bottom, Berdiev's only real argument that the BIA applied an incorrect standard is that because the BIA ruled against him, it must have applied the wrong standard and failed to consider his circumstances. Thus, Berdiev asks this Court to determine that Berdiev exercised due diligence as a matter of law. We address that issue next, but for now we conclude that the BIA did not apply an incorrect standard.

(3) Whether Berdiev demonstrated due diligence as a matter of law.

Berdiev's final equitable-tolling argument asks this Court to hold as a matter of law that Berdiev demonstrated due diligence in pursuing his ineffective-assistance-of-counsel claim. The pertinent facts are undisputed, and the only question is whether the Board abused its discretion in finding a lack of due diligence. It did not.

The BIA found a lack of due diligence because although Berdiev had "repeatedly contacted his second counsel to learn the status of his case," he failed to "explain why he persisted in those fruitless inquiries for almost three years before finally hiring his current attorney." (A.R. 30.) In declining reconsideration of that decision, the Board reiterated that Berdiev still had not explained the three-year delay and why he had "simply contact[ed] prior counsel over and again" despite admitting that "counsel repeatedly rebuffed his attempts to learn about the disposition" and "later ignored [Berdiev's] inquiries altogether." (Pet'r Br. 45.) Referring back to Berdiev's experience with Bull & Davies and its failure "to timely inform [Berdiev] that the Board had dismissed his appeal," the BIA concluded that "it is not clear why [Berdiev] would take no action when his second attorney repeated[ly] rebuffed and then became unresponsive to his inquiries." (Id. at 46.)

Berdiev raises three arguments against the Board's ruling: (1) the trouble with Bull & Davies would not have put Berdiev on notice as to potential future ineffective assistance of counsel, because Bull & Davies made an innocent mistake by sending notice to the wrong address, whereas Ziankovich's behavior was intentional and thus entirely different; (2) it was reasonable for Berdiev to wait three years before contacting a new attorney in light of his prior experience with the BIA, when it took the Board twenty-seven months to resolve his first appeal; and (3) he had every reason to trust [Ziankovich] and rely on him, and that as a "foreign-born individual unfamiliar with the U.S. legal system," (Pet'r Br. 32), he "should not be faulted for placing his trust and confidence in Mr. Ziankovich," (Reply Br. 15–16). Berdiev concludes that in light of these circumstances, it was sufficiently prudent for him to reach out to Ziankovich every two months for three years.

Those arguments have some potential merit. Where a non-citizen has learned that (1) a BIA appeal may take more than two years to resolve, and (2) lawyers can make mistakes and there can be negative consequences if you do not get notice of something within sixty days, it might be reasonably diligent for Berdiev to check in with his new attorney every two months for three years before turning to a new attorney. But Berdiev fails to account for one critical fact that the BIA relied upon: that in response to Berdiev's efforts to contact him, Ziankovich "repeated[ly] rebuffed and then became unresponsive to [Berdiev's] inquiries." (Pet'r Br. 27)

This fact is undisputed, as Berdiev concedes in his own affidavit that Ziankovich either ignored his calls or had his receptionist tell Berdiev that he was out

of town. The only time Ziankovich actually answered Berdiev's calls, Ziankovich yelled at Berdiev's wife to stop calling so often. Berdiev and his wife called every two months for approximately three years, while Ziankovich "continued to ignore [their] phone calls." (A.R. 92.) Berdiev's wife's affidavit confirms the same thing. (A.R. 232 ("Ziankovich . . . stopped answering our phone calls and . . . would never tell us anything.").)

Under these circumstances, the BIA did not abuse its discretion in determining that Berdiev had failed to demonstrate due diligence, because at some point during the three-year period, Berdiev likely "should have known of prior counsel's ineffectiveness." Esteban-Marcos v. Barr, 821 F. App'x 919, 922 (10th Cir. 2020) (unpublished) (quoting Galvez Pineda, 427 F.3d at 838). It might be different if Berdiev had persistently called Ziankovich and been reassured that his appeal was still pending and that Ziankovich would notify him as soon as it was resolved. But instead, Ziankovich essentially ignored Berdiev's calls for three years and refused to speak with him. The Board did not abuse its discretion in concluding that at some point during those three years, Berdiev stopped being duly diligent when he persisted in his "fruitless inquiries." (A.R. 30.)

The BIA based its decision on Berdiev's failure to explain why he continued calling for three years despite Ziankovich ignoring his calls. Berdiev failed to provide this explanation below and fails to do so now. This is fatal to Berdiev's arguments because it was his "burden to explain why [he] did not consult with another attorney sooner" and, "as the BIA observed, [he] provided no such

explanation." Esteban-Marcos, 821 F. App'x at 923. Other than pointing to his bimonthly calls, Berdiev "did not provide any information reflecting what [he] did to discover former counsel's alleged ineffectiveness." Id.

Where facts revealing counsel's ineffective assistance were known to Berdiev for a significant period of time before he sought new counsel, this Court "cannot countenance such dilatory conduct." Id. Ultimately, the BIA "recognized the possibility of equitable tolling if [Berdiev] had demonstrated that [he] acted with due diligence, and it explained why it concluded [he] failed to do so." Id. at 924. Nothing more was required of the BIA and it did not abuse its discretion in determining that Berdiev was not entitled to equitable tolling due to a lack of due diligence.[2]

We next address Berdiev's argument regarding his eligibility to adjust his immigration status despite his failure to depart voluntarily.

B. Whether the BIA declined to reopen sua sponte based on an incorrect legal premise.

Berdiev's second challenge is to the BIA's decision not to reopen sua sponte. Berdiev argues that the BIA based that decision on the erroneous legal conclusion that reopening would be futile because Berdiev was statutorily barred from adjustment of status due to his failure to depart voluntarily during the voluntary

[2] The government additionally argued that Berdiev had notice of the BIA's decision because the Board mailed a copy of the decision to his home address. The Board did not rely on this rationale in its due-diligence analysis, and because we affirm the Board's decision on the grounds it actually relied upon, we do not address the government's alternative argument.

departure period. We agree that the Board misperceived the legal background, because it failed to consider Berdiev's argument that, under BIA precedent, he was statutorily eligible for adjustment of status despite his failure to depart voluntarily. Because the Board relied on an invalid rationale at least to some extent, and because it is unclear from the Board's orders whether it additionally relied on some independent, valid reason for declining sua sponte reopening, we grant Berdiev's petitions for review, vacate the BIA's orders as to this issue, and remand to the BIA so it can reconsider whether to reopen sua sponte.

We start with the Board's reasoning for its decisions. In addition to ruling that Berdiev was not entitled to equitable tolling, the Board stated that, in any event, Berdiev was barred from the relief he sought because he was ineligible for adjustment of immigration status due to his failure to depart voluntarily during the sixty-day departure period. Berdiev's failure to depart is undisputed. Ordinarily, and as the BIA recognized, this would render Berdiev ineligible to receive any immigration status adjustment for ten years. 8 U.S.C. § 1229c(d)(1)(B).

But Berdiev correctly points out that the Board failed to consider the "voluntariness exception" to 8 U.S.C. § 1229c(d)(1)(B) that the BIA established in In re Zmijewska, 24 I. & N. Dec. 87 (BIA 2007). There, the BIA ruled that the ten-year statutory bar to status adjustment under § 1229(c)(d)(1)(B) does not apply to "a respondent who, through no fault of [his] own, remains unaware of the grant of voluntary departure until after the period for voluntary departure has expired." Id.

at 94. The BIA reasoned that such a respondent "cannot be said to have 'voluntarily' failed to depart within the period of voluntary departure." Id.

Below, Berdiev argued that he had never received notice of the voluntary departure period because his attorney (and the BIA) mailed notice to Berdiev's old address and the mail was returned as undeliverable. Berdiev cited to Zmijewska and argued that "[t]hrough no fault of his own, [Berdiev] was kept from knowing of the BIA's grant of voluntary departure until after the period for voluntary departure had expired." (A.R. 9.) Accordingly, Berdiev asserted that he "could not have 'voluntarily failed to depart' [under § 1229c(d)(1)(B)] during his 60-day voluntary departure order because he did not know about it." (Id. (citing Zmijewska, 24 I. & N. Dec. at 94).)

In its order denying Berdiev's second motion to reopen, the BIA did not reference Zmijewska or Berdiev's argument that he was unaware of the voluntary departure period. Instead, the BIA only stated that it rejected "respondent's claim that he was never made aware of the consequences for his failure to depart." (Id. at 30 (emphasis added).) Berdiev indeed made that claim as part of his ineffective-assistance-of-counsel argument, but he additionally claimed that he was unaware of the start and end of the voluntary departure period. The BIA addressed only the former claim. However, whether Berdiev was aware of the consequences of failure to depart is not determinative if he was not informed of a deadline requirement to depart. Thus, the BIA's denial of Berdiev's motion to reopen failed to address Berdiev's argument that he was unaware of the departure period and failed to

consider whether that would have allowed Berdiev to remain eligible for adjustment under Zmijewska.

In Berdiev's motion to reconsider, he reiterated that he had been unaware of the voluntary departure period through no fault of his own and was thus not statutorily barred from adjustment under Zmijewska. In its order denying Berdiev's motion, the BIA reaffirmed its prior determination of Berdiev's ineligibility. But each piece of the BIA's reasoning is either inaccurate or not responsive to Berdiev's arguments.

The BIA first asserted that it "previously determined that [Berdiev] did not establish ineffective assistance by his original counsel in these proceedings for failure to notify him of the dismissal of his appeal." (Pet'r Br. 22.) This is misleading. In denying Berdiev's first motion to reopen, the BIA held that Berdiev's motion had failed to satisfy procedural requirements for filing a motion to reopen based on ineffective assistance of counsel, so the BIA never reached the merits of Berdiev's claim. Thus, although it is true that Berdiev failed to establish ineffective assistance of counsel in his previous motion to reopen, he failed to do so solely on procedural grounds and the BIA never addressed whether Berdiev had actually received notice of the voluntary departure period.

The BIA next repeated its prior conclusion that "the record [does] not support [Berdiev's] claim that he was never made aware that his failure to voluntarily depart would bar him from adjustment." (Id.) As discussed above, whether Berdiev was aware of the consequences of failure to depart is not relevant to his argument that he

was not given notice of the voluntary departure period until after it had expired. He may have known the consequences of a failure to depart voluntarily as ordered, but Berdiev put on evidence that he was not advised of when he had to depart.

Finally, the BIA concluded that "[f]urther argument in this regard is merely an attempt to re-litigate the issue, which has already been decided." (Id. at 46.) But that is wrong: the BIA had never addressed Berdiev's claim that he was unaware of the voluntary departure period through no fault of his own and thus was not statutorily barred from adjustment under Zmijewska.

The BIA thus erroneously resolved the adjustment-of-status issue by relying upon irrelevant or inaccurate rationales. It also inexplicably departed from its own precedent by failing to address Berdiev's Zmijewska argument. To the extent the Board based its decision not to reopen sua sponte on the incorrect legal premise that Berdiev was necessarily ineligible for adjustment of status, that conclusion was invalid and warrants remand.

The government attempts to defend the BIA's ruling by arguing that Berdiev either did have actual notice of the voluntary departure period, or that he was at fault for any lack of notice because "he apparently failed to provide the Board or his attorney with an updated address at which to reach him."[3] (Resp. Br. 23.) The

[3] The government also asserts that Berdiev does not warrant relief because he allegedly told a Bull & Davies attorney in 2015 that he did not want to depart voluntarily and would not have voluntarily departed even if he was aware of the voluntary departure period. This assertion is not relevant to the legal issue before us, which is solely whether the Board relied on an inaccurate legal premise and an insufficient factual record in declining to reopen sua sponte.

problem with these arguments is that the government did not raise them below and the Board did not consider them, and thus, nor can we. We are limited to judging the propriety of the Board's rulings "solely by the grounds invoked by the agency." Carpio v. Holder, 592 F.3d 1091, 1103 (10th Cir. 2010) (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). This means that this Court "is powerless to affirm the administrative action by substituting what [may] be a more adequate or proper basis." Id. (alteration in original) (quoting Chenery, 332. U.S. at 196).

Adhering to this principle means that we are "not at liberty to search for grounds to affirm that were not relied upon by the agency." Uanreroro v. Gonzales, 443 F.3d 1197, 1205 (10th Cir. 2006). Here, the BIA did not rely upon the rationale that Zmijewska did not apply because Berdiev was at fault for his lack of notice of the voluntary departure period. Instead, the BIA failed entirely to address Zmijewska or Berdiev's argument that he had lacked notice. Under these circumstances, this Court is not "empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. . . . Rather, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Mickeviciute v. INS, 327 F.3d 1159, 1164–65 (10th Cir. 2003) (emphasis omitted) (quoting INS v. Ventura, 537 U.S. 12, 16 (2002)).

Here, the parties dispute whether the alleged lack of notice to Berdiev was a result of his failure to provide Bull & Davies with notice of his change of address. On one hand, Berdiev did not provide Bull & Davies with any official change-of-address notification, so he is conceivably at fault. On the other hand, Berdiev did

provide the firm with a letter referencing the move, and he also gave the firm his new address when preparing the new I-130 petition. Under these circumstances, it is at least arguable that Berdiev provided adequate notice of his change of address to Bull & Davies and that Bull & Davies was thus at fault for failing to send the BIA's decision to Berdiev's new address. Accordingly, Berdiev's fault is not so clear cut from the record that we could affirm on that basis setting aside for purposes of argument that the government failed to raise this argument below and the BIA did not consider it below.[4]

In light of this analysis, we conclude that the Board erred in its legal assessment of Berdiev's eligibility for adjustment of status. Thus, to the extent the Board declined to reopen sua sponte on that basis, that decision rests upon an invalid legal premise, warranting remand. However, at oral argument, the Court questioned whether the Board's sua-sponte-reopening decision might have been additionally supported by an alternative ground: that Berdiev did not warrant sua sponte relief because his motion was untimely and he did not warrant equitable tolling.[5]

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[4] We express no opinion as to the ultimate merits of this issue. We leave it to the Board to "bring its expertise to bear upon the matter; . . . evaluate the evidence; . . . make an initial determination; and, in doing so, . . . through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." Ventura, 537 at 17. This is the proper route where an agency "failed to address the issue that was actually before" it. Flores-Castillo v. Barr, 790 F. App'x 937, 940 (10th Cir. 2019) (unpublished).

[5] At oral argument, the government also raised a third potential basis for affirming the Board's decision not to reopen sua sponte: that the Board had found no exceptional circumstances warranting sua sponte reopening. Oral Arg. at 40:30–49:21 (citing the Board's denial of Berdiev's first untimely motion to reopen). Even (continued)

We based this line of questioning on the Board's statement in its order denying Berdiev's second motion to reopen, that "[e]ven assuming equitable tolling is warranted, we would deny the motion because the respondent cannot demonstrate prima facie eligibility for adjustment." (A.R. 30.) This could be read to say that the Board was rejecting both avenues for relief—equitable tolling and sua sponte reopening—for two independent reasons: (1) timeliness, and (2) failure to depart voluntarily. Above, we conclude that the latter reason is invalid because it was based on the inaccurate legal premise that Berdiev was necessarily statutorily ineligible for adjustment of status, failing to recognize the Zmijewska exception. But if the Board additionally based its sua-sponte-reopening decision on the timeliness rationale, we would need to consider whether that constituted an independent, valid ground for upholding that decision.

Although we conclude in Part IV.A.3 above that the BIA did not abuse its discretion in its equitable-tolling analysis, that does not necessarily mean that equitable tolling is a valid reason for denying sua sponte reopening. After all, the Board had the sua sponte authority to grant the untimely motion to reopen, regardless of whether equitable tolling was warranted, Mendiola v. Holder, 576 F. App'x 828, 841 (10th Cir. 2014) (unpublished) (citing 8 C.F.R. § 1003.2(a)),[6] so it would be

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if this argument had merit, the government waived it by waiting until oral argument to raise it. United States v. Abdenbi, 361 F.3d 1282, 1289 (10th Cir. 2004).

[6] As mentioned at oral argument, the applicable regulation was modified as of January 15, 2021. The modified rule "prohibits IJs and the BIA from reopening or reconsidering a case sua sponte except to correct minor mistakes." Centro Legal de

(continued)

illogical for the Board to decline to exercise that authority on the basis that the motion was untimely and equitable tolling was not warranted. In other words, it makes no sense for the Board to decline to exercise its sua sponte authority to grant an untimely motion, on the basis that the motion was untimely. That reasoning would be circular, nullifying the Board's sua sponte authority to reopen despite untimeliness.

However, Berdiev fails to raise that argument and thus waived it. So if the Board in fact relied on its equitable-tolling decision as an independent basis for denying sua sponte reopening, we would need to deny the petition for review. In contrast, if that was not an independent rationale for denying the separate request for sua sponte reopening, we would need to grant review, vacate, and remand, because we do not know what the outcome would have been without the erroneous reliance on Berdiev's purported ineligibility for adjustment of status.

Despite our close review of the Board's rulings, we cannot be certain whether the Board independently relied upon both grounds in declining to reopen sua sponte. The Board simply did not articulate whether it declined sua sponte reopening solely because of the failure to depart voluntarily, or additionally because Berdiev is not entitled to equitable tolling of his untimely motion. In light of this uncertainty, we must remand to the Board so that it can reconsider whether to reopen sua sponte, or

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la Raza v. Exec. Off. for Immigr. Rev., -- F. Supp. 3d --, 2021 WL 916804, at *12 (N.D. Cal. Mar. 10, 2021). But that modified rule is apparently the subject of a nationwide preliminary injunction, and the government is enjoined from implementing or enforcing it. Id. at *44.

alternatively, to articulate a clear, valid rationale for declining sua sponte reopening.[7] See Zzyym v. Pompeo, 958 F.3d 1014, 1033–34 (10th Cir. 2020) ("If we can't determine whether the agency necessarily relied on deficient reasons, it would make little sense to uphold the agency's action. In these cases, remand is appropriate 'since proceeding on the right path may require or at least permit the agency to make qualifications and exceptions that the wrong one would not.'").

V. CONCLUSION

For the foregoing reasons, the Court grants Berdiev's petitions for review, vacates the Board's two orders solely as to the sua-sponte reopening decision, and remands to the Board to reconsider that decision in light of our opinion.

[7] We recognize that our decision further prolongs removal proceedings that have dragged on for fourteen years while Berdiev remains in the United States. We also recognize that Berdiev appears to be a fairly flagrant violator of immigration rules. Nonetheless, "we must resist the temptation of stepping out of our limited judicial role even where resolving the merits ourselves may seem an easier, more efficient, and more palatable course." Mickeviciute, 327 F.3d at 1165.